IN THE

# SUPREME COURT

OF THE

## UNITED STATES

October Term, 1902.

ANTON JOHANSON,
Plaintiff in Error.

vs.

THE STATE OF WASHINGTON,
Defendant in Error.

NO. 282.

In Error to the Supreme Court of the State of Washington

## Supplemental Brief for Defendant in Error.

W. B. STRATTON, Attorney General,
Attorney and Counsel for Defendant in Error.

The selections made by the county commissioners and approved by Secretary Delano in the year 1872, under the acts of 1853 and 1859, operated at least as a reservation of the land question.

This reservation has never been destroyed, nor

has the land ever become a part of the public domain subject to entry by settlers.

Wilcox vs. Jackson, 13 Pet. 513.

Leavenworth &c., Ry. Co. vs. U. S., 92 U. S. 745.

No department of the United States and no court has recognized the right of Johanson to enter the land under the public land laws. The land having been since 1872 reserved from entry, Johanson, since he entered in 1893, has been a willful trespasser and of course could gain no rights by reason of having placed improvements upon the land. If he could, then a trespasser may plead his wrongful act to establish a title. He was at all times conclusively presumed to know that the land he settled upon was reserved and therefore not open for settlement. In fact he has never claimed that the fact of placing improvements on the land gave a superior right. The sole basis of his claim is that the land in 1893 was subject to entry.

It is claimed by plaintiff in error that the enabling act of 1889 cancelled the reserve created by the selection and approval of 1872. We submit that the enabling act cannot fairly be so construed. The most that can be said is that only a part of the land theretofore reserved, was granted by the enabling

act to the state for common school purposes. Assuming that only sections 16 and 36 were so granted, what became of the balance of the reserve? No provision of the law turns it back into the public domain; and if this is true, then it remains as a continuing reserve not subject to entry. See cases supra. Suppose a thousand acres of public land were reserved as a military reservation and that ten years after its creation an act of Congress were passed granting the EAST half of it to the state in which it was located. What would become of the west half? Clearly, it would still be a military reserve. But under the reasoning of plaintiff in error the west half would thereby be discontinued as a reserve, and thrown open to entry. If, then, the land in controversy continued to be reserved after the passage of the enabling act, and therefore not subject to the entry of Johanson, what effect should be given to the act of congress passed in the year 1891, 26 Statutes at Large, page 796? It is claimed by plaintiff in error that the enabling act authorized lieu selections only in case sections 16 and 36 had been settled upon prior to survey. We think the enabling act should be construed with the acts of 1853 and 1859, and if this is done then

lieu selections might be made on account of deficiencies arising from natural causes.

See Sharpstein vs. State, 13 Land Dec. 378.

John W. Bailey, 5 Land Dec. 216.

Smith's case, 11 Land Dec. 382.

But the act of 1891, supra, makes this point clear. Under it the state might make selections in lieu of sections 16 and 36 "where one or both are wanting by reason of the township being fractional, or from any natural cause whatever." After the passage of the act of 1891, under it the state did select from the land already in a state of reserve under the acts of 1853, 1859 and 1889, the land in controversy. This then passed title to the state, even if it never had it before.

See Approval of Commissioner and of Secretary of Interior, made in 1895, pages 7 and 8 first brief herein of defendant in error, where it is expressly found that the lands in question are embraced in a list of lands selected "by a duly authorized agent of the state." So this land must have been also selected by the state, under the act of 1891, and if this is true then the state has title. Johanson never had any claim superior to a selection made by the state under the act of 1891, because the land has been at least in a state of reserve since 1872, and at

all times since subject to the absolute control of congress.

We wish to disclaim any intention to misquote the act of the 57th congress, set forth on pages 16 and 17 of our original brief. We ask the court to examine the act, which is not at this time accessible to us. The state also disclaims any attempt to "steal" the property of Johanson. The property never belonged to him, and it is the duty of the state to put the question of title beyond controversy, for the benefit of the common schools. But even if the said act of congress was amended in the respects claimed by plaintiff in error, such amendment is immaterial for the act even with the amendment, confirmed the title in the state and declared that the title had passed to the state by the enabling act of 1889.

The intent of congress to reserve this land for and to grant it to the state, for the use of schools, cannot be mistaken when all these acts are considered, and we cannot believe that the court will hold that congress has failed to carry out the intent which so plainly appears, by placing upon the acts of congress the technical, strained and narrow construction contended for by plaintiff in error, for the subject of these acts of congress is one with reference

to which the utmost liberality has always been exercised.

The United States and the State of Washington are both satisfied with the methed of selection, as declared in the decisions of the Secretary of the Interior heretofore cited, and it does not lie with a mere trespasser to question the regularity of such selection.

Again, the act of 1859 did more than reserve the land in question; it "pledged" and "appropriated" it. And the lands by that act "appropriated, shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the act of congress of May 20, 1826, * * * "

The act of May 20, 1826, provided that the lands selected "shall be held by the same tenure and upon the same terms for the support of the schools in such township, as section number sixteen is, or may be held, in the state where such township shall be situated.

There is no doubt but what sections sixteen and thirty-six are owned by the State of Washington absolutely, and the lieu lands selected pursuant to the acts of 1859 and 1826 are held "by the same tenure," and it seems to me that there can be no

more question about title to lieu lands than there can be to the title to section sixteen.

It is claimed by plaintiff in error that the act of 1859 was not applicabble to the Territory of Washington. It is sufficient to say that the act of 1859 was simply an enlargement of the act of 1853; was general in its nature and applicable to all the states and territories. But whether the act of 1859 applied to the Territory of Washington is immaterial, because as stated in our original brief it conclusively appears from the stipulation of the parties and the findings of the courts that the land in question was selected on the basis common to both the acts of 1853 and 1859, namely, on account of the school sections having been settled upon prior to survey by persons entitled thereto.

We contend that section 10 of the enabling act granted to the state all the lieu lands theretofore selected. It will be noticed that the grant of sections 16 and 36 was not "in lieu" of any previous grants or reservations, but was rather confirmatory of them. Other grants were made by the enabling act "in lieu" of the swamp land grant, the grant for internal improvements, and the grant of saline lands previously made by congress and which were applicable to the Territory of Washington. (Sec.

17, Enabling Act of 1889). This it seems to me, shows a clear intent on the part of congress to grant to the state land that had theretofore been held in reserve for the common schools.

The position of plaintiff in error is that the act of 1889 repealed the acts of 1853 and 1859. If it repealed those particular acts it also repealed all other acts which had theretofore been passed by congress making reservations or grants to the Territory of Washington for educational purposes. That it did not have the effect claimed we think is clear. For instance, it did not repeal the act of congress of June 2, 1862, (12, Stat. at Large, 503) entitled, "An act donating public lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," and the acts supplemental thereto, because the conditions which attached to the grant made by the act of 1862 continue to be a part of the conditions under which the state holds agricultural lands by virtue of the grant thereof made by the enabling act of 1889.

See also, State ex rel Koch vs. Barrett, 26 Mont. 62.

The list approved in 1895 recites: "Approved list No. 1 of school indemnity lands exhibiting the

tracts of public lands situate in the district of lands to which such townships are entitled have not been granted in place, and which selections are provided for in the act of congress approved March 2, 1853, entitled 'An act to establish the territorial government of Washington.' The act approved February 26, 1859, entitled 'An act authorizing settlers upon sixteenth and thirty-sixth sections who settled before survey of the public lands to pre-empt their settlements,' embodied in sections 2275 and 2276 of the revised statutes of the United States."

Under the head "Date of Selection," and "No. of List," in said list approved in 1895, it also appears that the land in question was selected "May 24, 1870," by List No. "2."

Lands in List No. 2 were selected by Lewis May 20, 1870, so the approval of 1895, under the cases cited, related back to the old selection of 1870. The "Approved list No. 1," etc., embodied list No. 2 made by Lewis in 1870, with other old lists. There is no reason why the approval of list in 1895 should not relate back to date of original selection because no rights could have intervened for the reason that the land was during all of the time reserved from entry.

Moreover, the state showed title by reason of the approval of 1895. If plaintiff in error claims that such approval could only relate back to a selection made subsequent to March 26, 1890, (See plaintiff in error's reply brief, p. 4) or subsequent to the act of congress of 1891, then the burden was on him to show that his settlement was prior to that selection. This he failed to do. In other words, the state showed title and Johanson failed to establish any claim against such title. So whether the aproval of 1895 amounting to an entirely new selection dating from the time the list was filed after act of Washington legislation of March 26, 1890, or after the act of congress of 1891, or whether it related back to the original list filed in 1870, is wholly immaterial. The case at bar we think does not fall within the principles of Barkley vs. The State of California, 6 Land Decision 699, assuming that case not to have been overruled.

The approval of 1895, which saved any valid interfering rights is no protection to plaintiff in error for he had none; the approval recognized none which were not valid.

The act of December 20, 1902, confirmed the title in the state and it makes very little difference under



what particular laws, or selection, or approval the title passed to the state. We think that congress, even when land is not in a state of reserve, may grant the same and a settler thereon who has not perfected his title, has no claim to the land thus granted as against the grantee of the United States. The State of Washington is such grantee.

It is respectfully submitted that the decision of the state supreme court should be affirmed.

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